In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-841

ROSE MARIE PORTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are stockholders of Micronesia Interocean Line, Inc. (MILI, now renamed Transpacific Lines, Inc.). They sued the United States in the Court of Claims for damages for an alleged breach of a contract between MILI and the Government of the Trust Territory of the Pacific Islands and for compensation for a claimed taking of their property without just compensation. The Court of Claims, in an opinion on which we rely (Pet. App. A, 1a-15a), found that it was without jurisdiction to grant the relief sought.

The facts giving rise to the claim are set forth in the opinion of the Court of Claims. Briefly, in 1968 the Office of the Trust Territory High Commissioner announced that it was seeking proposals for a 10-year sea transportation contract to connect the islands in the Trust Territory with one another and with the west coast of the United States. The solicitation for proposals

made it clear that the contract was to be with the Trust Territory Government, and directed that proposals be submitted to the High Commissioner of the Territory, with a copy to the Director of the Office of Territories, United States Department of the Interior. A review panel at the Department of Interior met with representatives of the bidders, and recommended a contract with Marine Chartering Company, Inc. (Marine) (Pet. App. A, 2a).

After negotiations, a contract was entered into and signed by the Government of the Trust Territory and Marine. In accordance with the contract terms Marine assigned the contract to Micronesia Interocean Line, Inc. (MILI), a corporation organized for this purpose under the laws of the Trust Territory, the capital stock of which was owned by Marine and citizens of the Trust Territory. MILI's ships were operated under the flag of the Trust Territory (Pet. App. A, 2a-3a).

In 1971 the Trust Territory, concerned with MILI's failure to maintain a required letter of credit and other alleged lapses in MILI's performance, notified MILI that it intended to terminate the agreement. After negotiations between Marine and the Attorney General of the Trust Territory, the Trust Territory withdrew its notice of default and Marine, MILI, and the Trust Territory Attorney General became parties to a Trust Agreement, which designated the Trust Territory Attorney General as trustee of Marine's stock in MILI (Pet. App. A, 3a).

Petitioners, some of the stockholders of MILI, thereafter brought a class action against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. (Supp. II) 1491,[1] alleging breach of the contract by the Trust Territory and deprivation of their property

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[1]The text of the Act is reproduced at Pet. App. B, 1b.

without due process of law. Petitioners sought to invoke the jurisdiction of the Court of Claims by asserting that their claim arises from an express or implied contract with the United States (Pet. App. A, 4a).

The court granted the United States' motion for summary judgment on the ground that the claims stated were not against the United States, and hence, the court lacked jurisdiction to hear the claims.[2]

The decision of the Court of Claims is correct, is not in conflict with decisions of other courts, and presents no issue warranting further review.

1. Petitioners have stated no contract claim against the United States. The United States was not a signatory to either the initial contract between the Government of the Trust Territories and Marine or the subsequent trust agreement. The acts alleged by petitioners to have constituted a breach of the agreement (and to have deprived them of property without due process of law) were all alleged acts of the High Commissioner and Attorney General of the Trust Territory, not acts of the United States as such (Pet. 5-6; Pet. App. A, 3a-4a). And, as we show below, the Government of the Trust Territory is not an instrumentality of the United States so as to make the United States a party to the contract at issue here.

By agreement ratified by the Security Council of the United Nations on April 2, 1947, and approved by a joint resolution of Congress on July 18, 1947, the United States was designated "Administering Authority" over the Pacific Islands Trust Territory. 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. In accepting trusteeship, the

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[2]Contrary to petitioners' claim (Pet. 9), the Court of Claims did not base its decision on the fact that the actions complained of occurred outside the United States, but rather that they were not taken by the United States (Pet. App. A, 12a).

United States made it clear that it did not accept sovereignty over the islands. 16 Dept. of State Bull. 416, 417 (1947). This disavowal of sovereignty is in accordance with the accepted view of trust territories under international law: "[w]herever sovereignty does rest [with respect to the trust territories] it is not with the administering power." Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 Am. J. Int'l Law 263, 271 (1948).

In 1962, the authority for civil administration of the Territory was delegated to the Secretary of the Interior, who, in 1964, established a Trust Territory government having legislative, judicial, and executive branches, with a High Commissioner as chief executive officer for the territory. See Secretarial Order No. 2918, December 27, 1968, 34 Fed. Reg. 157. This domestic government governs the Trust Territory.[3]

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[3]The United States, however, has retained control over foreign affairs and has reserved the authority to contract "*on behalf of the Trust Territory*" (emphasis added) for various kinds of transportation services. Secretarial Order No. 2902, November 15, 1967, 32 Fed. Reg. 16058. While officials of the Department of the Interior thus participated in obtaining the contract with Marine, it was clear that they acted as agents for the Trust Territory. The solicitation for proposals and contract, moreover, specifically provided that the agreement was to be with the Trust Territory government (*supra*, pp. 1-2; see also Def. Exh. 2, pp. 1-2).

It is thus also clear that not only was there no expressed contract but there was no contract implied in fact between MILI and the United States. As the officials who negotiated and signed the agreement were acting as agents of the Trust

That the Trust Territory is not an agency or instrumentality of the United States is also shown by its treatment by the courts. It has been deemed a "foreign country" under the Federal Tort Claims Act, 28 U.S.C. 2680(k) (see *Callas* v. *United States*, 253 F.2d 838 (C.A. 2), and *Brunell* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.)) and a "foreign state" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(14) (*Application of Reyes*, 140 F. Supp. 130 (D. Ha.); *Aradanas* v. *Hogan*, 155 F. Supp. 546 (D. Ha.)).

Contrary to petitioners' contention (Pet. 8-9) the decision of the Court of Claims is also supported by, not in conflict with, the decision of the Court of Appeals for the Ninth Circuit in *People of Saipan* v. *United States Department of Interior*, 502 F. 2d 90 (petition for a writ of certiorari pending, No. 74-622). In *People of Saipan* the court of appeals held that the action of the High Commissioner of the Trust Territory in approving a lease for a hotel "was not 'federal' action covered by the National Environmental Policy Act" (502 F. 2d at 94-95) and that the Administrative Procedure Act does not apply to the territorial government. The court further held that the plaintiffs might have a cause of action against the High Commissioner based on the Trust Agreement

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Territory, and not of the United States, there could be no meeting of the minds necessary to bind the United States to the agreement.

Nor does the fact that the salaries of Trust Territory officials are paid by funds of the United States appropriated for the administration of the Trust Territory make them agents of the United States. Rather, the officials act on behalf of the Trust Territory under a plan implemented in furtherance of responsibilities the United States assumed under its agreement with the United Nations regarding the Trust Territory. They are agents of the Trust Territory. See *Harris* v. *Boreham*, 233 F.2d 110 (C.A. 3), which held, that the Superintendent of Public Works for the municipalities of St. John and St. Thomas in the Virgin Islands, though paid by Congress, was not an employee of the United States for purposes of the Tort Claims Act.

between the United Nations and the United States, but emphasized that that action should first be pursued in the courts of the Trust Territory (*id.* at 95-96):

> This clear statement of intent on the part of the United Nations to foster self-government in the Trust Territory constrains us not to hold that the actions of the local government are reviewable in the same manner as the actions of domestic federal administrative agencies, in a federal district court several thousand miles from the islands.[4]

2. The Court of Claims also correctly similarly found that there was no taking of petitioners' property by the United States (Pet. App. A, 11a-13a). The complaint with regard to the taking alleges wrongdoing on the part of certain officials of the Trust Territory (Pet. App. A, 11a). As we demonstrated above, the Trust Territory officials act on behalf of the Trust Territory and not the United States. The Court of Claims thus correctly determined that it lacked jurisdiction over the claimed taking as well as the claimed breach of contract.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[4]For a more complete discussion of *People of Saipan* we refer the Court to our brief in opposition and supplemental brief in that case, copies of which we are furnishing petitioners in this case.

[5]Petitioners do not substantiate their claim that they have no adequate remedy in the courts of the Trust Territory (see Pet. 11). In any event, the availability of review in the Trust Territory courts does not affect the jurisdiction of the Court of Claims.